IN THE SUPREME COURT

Appeal From The Court Of Appeals
[Honorable Janet T. Neff, E. Thomas Fitzgerald, Michael J. Talbot]

ROBERT R. ANDERSON and CHRISTINE M. ANDERSON, on behalf of themselves and as NEXT FRIEND of ROBERT C. ANDERSON, a Minor,

Plaintiffs-Appellees,

v.

PINE KNOB SKI RESORT, Inc., a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No. 121587
Court of Appeals Case No. 227832
Oakland County Circuit Court
Case No. 99 016011 NO

BRIEF ON APPEAL – APPELLEES ROBERT R. ANDERSON, ET AL.

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JURISDICTIONAL STATEMENT

This Court entered an order granting leave in this case on October 30, 2002. This Court therefore has jurisdiction over the case under MCR 7.302(F)(3).

QUESTIONS PRESENTED

1. Whether Plaintiff Robert Anderson's claims are barred by MCL 408.342(2).

   The Circuit Court answered "no."

   The Court of Appeals answered "no."

   Anderson answers "no."

   Defendant Pine Knob Ski Resort, Inc. ("Pine Knob") answers "yes."

The following two Questions have not been preserved for review by this Court, but are nonetheless addressed in the parties' briefs:

2. Whether Anderson's claims are barred by the common-law "open and obvious" doctrine.

   The Circuit Court answered "no."

   The Court of Appeals answered "no."

   Anderson answers "no."

   Pine Knob answers "yes."

3. Whether the Ski Area Safety Act, MCL 408.321 *et seq.* (the "Act"), displaces *in toto* the common law of premises liability as applied to ski-area operators.

   The Circuit Court did not address this issue.

   The Court of Appeals did not address this issue.

   Anderson answers "no."

   Pine Knob appears to answer "yes."

I. STATEMENT OF FACTS[1]

A. The Accident

On January 5, 1999, Pine Knob hosted a high school ski race in which Detroit Country Day and several other Detroit area high schools participated. Deposition of Jeremy Parrot at 7 (App 2b). In exchange for hosting the race, Pine Knob received a fee from each school and skier. Deposition of Robert Shick at 7-8 (App. 5b-6b). Pine Knob designated the part of its premises in which the two courses used for the races were located. *Id* at 12 (App. 10b).

Prior to the races on January 5, 1999, Pine Knob placed a wooden "timing shack" between the finish lines for each of the two courses, which ran roughly parallel to each other on a single slope. Deposition of Daniel Costigan at 39; Shick Deposition at 32, 42-43 (App. 31b; 15b, 25b-26b). The shack was located about eight to 10 feet to the side of the finish line for the course on which Bobby Anderson was skiing when his accident occurred. Costigan Deposition at 38-40; Parrot Deposition at 8 (App. 30b-32b; 3b). The finish-line area is where the skiers reach their maximum speed, since that portion of the course is straighter and skiers typically finish in a "tuck" position. Costigan Deposition at 54; Deposition of Earl Rosengren at 60-61 (App. 36b; 50b-51b).

The timing shack was a crude wooden structure, which was portable and resting on pallets. Deposition of Joseph Kosik at 38-39 (App. 54b-55b). It easily could have been moved with a forklift. *Id.* The front of the shack was partially padded, but the remainder of the shack, including its sides and corners, was bare. Shick Deposition at 27-28 (App. 11b-12b). The shack housed timing equipment for the race. *Id* at 30 (App. 13b).

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[1] The evidence must be considered "in the light most favorable" to Anderson, since he seeks denial of Pine Knob's motion for summary disposition. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 164; 645 NW2d 643 (2002).

Pine Knob's General Manager, Robert Shick, admitted it was unnecessary to place the timing shack so close to the finish line for the races. *Id* at 35 (App. 18b) (agreeing "it could be anywhere"). The coaches for two of the participating teams confirmed this point. Costigan Deposition at 17; Rosengren Deposition at 25 (App 28b; 48b). Coach Costigan also testified that the shack is now located at the top of the race course rather than the bottom. Costigan Deposition at 17 (App. 28b). In fact, as Coach Rosengren observed, there is no need to have a timing shack at all. Rosengren Deposition at 17 (App. 47b).

On the day of his accident, Bobby Anderson was a sophomore at Detroit Country Day high school, aged 16, and a member of the school's varsity ski team. Deposition of Robert Anderson at 5-6, 31 (App. 57b-58b, 63b). Anderson was an expert skier, and had been skiing for 10 years. *Id.* at 27-28 (App. 59b-60b).

At the end of Anderson's first run that day, he placed second among all skiers. As Bobby completed his second run, however, he "caught an edge" of his ski, causing him to veer to the right. "Catching an edge" is a common occurrence in skiing – as Coach Costigan testified, "[y]ou see it almost every day" – and its occurrence does not mean the skier is skiing negligently or out of control. Costigan Deposition at 51, 27 (App. 33b, 29b). Catching an edge does, however, require a certain distance to correct, the amount of which depends on the skier's speed. *Id* at 63.

Upon catching an edge at the end of his second run, Bobby Anderson almost immediately struck an unpadded portion of the timing shack. Bobby did not fall to the ground before striking the shack. Anderson Deposition at 51 (App 65b). His father was the first one to reach him after the impact. *Id* at 65 (App. 66b). As a result of the impact with the shack, Bobby broke his right wrist, arm, and leg, chipped several teeth, and lost one permanently. He also suffered severe

lacerations to his face, arm, and knee, which have resulted in scarring. He has undergone numerous surgeries to his leg and mouth, which resulted, among other things, in the insertion of a metal rod into his leg. *Id* at 88-93 (App. 67b).

B. Proceedings Below

After the close of discovery, Pine Knob moved for summary disposition, arguing that Anderson's claims are barred by the Ski Area Safety Act, MCL 408.321 *et seq.* Specifically, Pine Knob argued that Anderson's injuries were caused by variations of terrain, ice or snow, the risks for which a skier is deemed to assume under MCL 408.342(2). Pine Knob also argued that Anderson's injuries otherwise resulted from an "obvious and necessary" hazard (namely, the timing shack's placement near the finish line) as that term is used in § 342(2). Finally, Pine Knob argued that Anderson's claims are barred by the common-law "open and obvious" doctrine.

The Circuit Court denied Pine Knob's motion. The Court found that "it's the placement of the shack" – and not any variation in snow or terrain, as Pine Knob had contended – "that caused [Anderson's] injuries." App. 104a. The Court also found that "the timing shack is not a hazard as contemplated by the Act." App. 102a. Accordingly, the Court held that Anderson's claims are not barred.

The Court of Appeals granted leave to appeal, with Judges Talbot, Neff, and Fitzgerald presiding. In an unpublished per curiam opinion, the Court held that Anderson's claims are not barred by the Act. Disposing of Pine Knob's principal argument on appeal, the Court reasoned:

> The injuries were the result of the minor plaintiff's collision with the timing shack after he veered off course. We agree with the trial court that the collision with the timing shack caused the injuries. We also note there was *no evidence* that the minor plaintiff even "caught an edge" because of a variation in terrain or a condition of the surface or subsurface ice or snow. [App. 113a (emphasis added).]

The Court likewise rejected Pine Knob's assertion that the timing shack was an "obvious and necessary" hazard under § 342(2). Noting the gratuitous nature of the risk posed by the shack, the Court observed that "[w]ithout the timing shack, there could have been skiing and, in fact, ski racing." App. 113a. Thus, the Court held, "[t]he timing shack was not an obvious *and necessary* hazard as contemplated by the [Act]." *Id* (emphasis in original). Accordingly, the Court concluded, the Act does not bar Anderson's claims.

The Court also held those claims are not barred by the common-law "open and obvious" doctrine. Applying this Court's analysis in *Lugo v Ameritech Corp,* 464 Mich 512; 629 NW2d 384 (2001), the Court examined whether "special aspects" of the harm posed by the shack's placement near the finish line precluded application of the doctrine here. Reciting the evidence in the case at some length, the Court of Appeals held: "[T]here is a question of fact about whether defendant could have anticipated the unreasonable risk of harm or severity of harm that the placement of the timing shack presented to the ski racers, who could lose their balance near the finish line." Thus, the Court concluded, "[s]ummary disposition was properly denied." App. 115a.

Pine Knob thereafter filed an application for leave to appeal to this Court. Pine Knob's application presented only one question: "Did the Michigan Court of Appeals err when it affirmed the Trial Court's order denying defendant's motion for summary disposition where the plaintiff's injury resulted from an enumerated danger under MCL 408.342(2)?" App. 74b (Pine Knob's Application for Leave to Appeal, at xi).

This Court granted leave to appeal.

II. SUMMARY OF ARGUMENT

Anderson's claims are not barred by the Act or the common law. The principal issue below – and the only issue on which Pine Knob sought review in this Court – was whether Anderson's claims are barred by the Act's assumption-of-risk provision, MCL 408.342(2). That section provides that skiers assume the risk of "obvious and necessary" dangers which "inhere in the sport" of skiing. No such danger caused Anderson's injury in this case. Contrary to Pine Knob's contentions on appeal, there was ample testimony that Anderson's injury was not caused by a variation in terrain, snow or ice, which are enumerated risks under § 342(2). Indeed that testimony was unrebutted. There was likewise ample testimony that the danger posed by the timing shack was unnecessary, thus putting it outside the scope of § 342(2). Specifically, there was ample testimony – again without rebuttal – that the shack could have been placed farther away from the course's finish line, and indeed that it could have been placed anywhere. There was also testimony that there was no need for a shack at all. All of this evidence plainly precluded any holding – particularly on summary disposition – that § 342(2) bars Anderson's claims.

The common-law "open and obvious" doctrine likewise does not bar Anderson's claims. As an initial matter, review of this issue was neither sought nor granted in this Court. The issue thus is not preserved for review; Anderson briefs it only because Pine Knob has. As for the merits, two "special aspects" of the danger posed by the timing shack preclude application of the doctrine here. First, the danger posed by the shack was effectively unavoidable for Bobby Anderson. It was undisputed below that Pine Knob designated the area in which the race was to be run; that Pine Knob chose the location for the timing shack; and that Bobby Anderson had no choice but to finish his race within a few feet of the shack's location. Second, the shack posed

an unreasonable risk of severe harm. There was unrebutted testimony that Anderson and the other skiers in the race would typically reach their maximum speeds just as they encountered the danger posed by the shack. That danger, moreover, was unreasonable because it was unnecessary. And even a brief review of the cases under the Act reveals that skiing injuries are often extremely serious, frequently involving quadriplegia or death.

Finally, the Act does not displace *in toto* the common law of premises liability as applied to ski-area operators. As an initial matter, this issue was not preserved for review by this Court, since it was neither raised nor decided below. Nor has it ever been ruled upon by any Court of Appeals. Under the settled practice of this Court, therefore, this issue should not be decided in this case. As for the merits, for several reasons, the enumeration of ski-area operator duties under MCL 408.326a is not to the exclusion to other duties owed by operators under the common law. First, this Court has repeatedly, and recently, held that statutes in derogation of the common law – of which the Act is indisputably one – must be construed narrowly, and cannot be construed to abrogate the common law by implication. In accordance with this rule, numerous Michigan statutes expressly provide for the abolition of the common law in some respect. Here, in contrast, the Act nowhere states that it abolishes all of the common law of premises liability as applied to ski-area operators. Thus, if the Act were regarded as abolishing such common law, it could only do so by implication; and that is precisely the construction forbidden by the settled law of this Court.

Second, such a construction of the Act would render § 342(2) surplusage. The duties imposed upon ski-area operators under § 326a are discrete and highly specific. By their plain terms, they do not include any duty to protect skiers from the dangers listed in § 342(2). Accordingly, if the enumeration of operator duties in § 326a were exclusive, there would be no

need to specify that skiers assume the risk of the dangers listed in § 342(2), because operators would have no duty to prevent those dangers in the first place. The duties enumerated under § 326a, therefore, do not displace *in toto* the common law of premises liability as applied to ski-area operators. Otherwise, the centerpiece of the 1981 Amendments to the Act – § 342(2) – would be surplusage.

III. ARGUMENT

A. Standard Of Review

This Court reviews *de novo* the decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Pohutski v City of Allen Park,* 465 Mich 675, 681; 641 NW2d 219 (2002).

In considering a motion under MCR 2.116(C)(10), the Court must consider all the evidence "in the light most favorable to the party opposing the motion," in this case Anderson. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 164; 645 NW2d 643 (2002).

B. MCL 408.342(2) Does Not Bar Anderson's Claims

Section 342(2) provides:

> Each person who participates in the sport of skiing accepts the dangers that inhere in the sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

Pine Knob's principal argument below – and the only issue on which it sought review in this Court – is that § 342(2) bars Anderson's claims. Specifically, Pine Knob asserts that Anderson's injuries were caused by a variation in terrain or snow. Alternatively, Pine Knob asserts that Anderson's injuries were caused by an "obvious and necessary" danger which

"inhere[s] in the sport" of skiing, namely, the placement of timing shack near the course's finish line.

Neither of these arguments withstands scrutiny. First, the record in this case precludes any finding – particularly on summary disposition – that Anderson's injuries were caused by a variation in terrain or snow. As the Court of Appeals correctly observed, no evidence supports this theory, and a good deal of evidence contradicts it.

Pine Knob's theory is that a variation in terrain or snow caused Anderson to catch and edge, which in turn caused him to strike the timing shack. There was ample testimony, however, that a skier can catch an edge for reasons unrelated to variations terrain or snow, *e.g.,* a momentary loss of balance. Rosengren Deposition at 48; Costigan Deposition at 27 (App. 49b; 29b). Anderson indeed testified that the reason he caught an edge was a loss of balance. Anderson Deposition at 50 (App. 64b). As the Court of Appeals pointed out, this evidence was unrebutted: "[T]here was *no* evidence that the minor plaintiff even 'caught an edge' because of a variation in terrain or a condition of the surface or subsurface ice snow." App. 113a (emphasis added). Thus, for purposes of this appeal – and in fact – Anderson's injuries were not caused by a variation in ice or snow.[2]

Second, the record precludes any finding that Anderson's injuries were otherwise caused by an "obvious and necessary" danger which "inhere[s] in the sport" of skiing. MCL

[2] Pine Knob's theory also rests implicitly on certain dubious assumptions regarding proximate cause. To wit, Pine Knob assumes that, if Anderson caught an edge due to a variation in terrain or snow, that variation, and not the gratuitous hazard posed by the timing shack itself, was the proximate cause of his injuries. This assumption, which is doubtful to begin with, is shown to be plainly incorrect when one considers that Anderson never even fell to the ground – and thus suffered no injury whatsoever – before striking the shack. Anderson Deposition at 51 (App. 65b).

408.342(2). Pine Knob's theory on this point is that the danger posed by the timing shack fits this description. Clearly, however, it does not.

There was ample testimony that the danger posed by the shack – and indeed the shack itself – was entirely unnecessary. There was no need to place the shack – an undisputedly portable structure – in the vicinity of the finish line, much less eight feet away from it. Pine Knob's own General Manager, Robert Shick, conceded the shack "could be anywhere." Shick Deposition at 35 (App. 18b). Ski coach Joseph Kosik, who otherwise made every effort to defend Pine Knob's conduct, similarly conceded that the shack's location near the finish line "was just one possible place to put it, of many." Kosik Deposition at 30. (App. 53b). Indeed the shack is now located at the top of the course, not the bottom. Costigan Deposition at 17 (App 28b). None of this evidence was contradicted in any respect. Moreover, Coach Rosengren testified there was no need for a shack at all. Rosengren Deposition at 17 (App. 47b).

The danger posed by the shack's placement a mere eight feet from the finish line, therefore, was unnecessary. Section 342(2), by its plain terms, applies only to dangers that are "necessary." Thus, the danger posed by the shack's placement is not one that Anderson assumed under § 342(2).

C. Anderson's Claim Is Not Barred By The Open And Obvious Doctrine

1. This Issue Has Not Been Preserved For Review By This Court

In its application for leave to appeal to this Court, Pine Knob chose not to seek review of the Court of Appeal's holding that Anderson's claims are not barred by the open and obvious doctrine. Anderson accordingly did not brief this issue in his opposition to the application. Nor were the parties directed to brief this issue in this Court's order granting leave. This issue,

therefore, is one on which review was neither sought nor granted. Consequently, the issue is not properly before the Court.

Pine Knob has nevertheless briefed this issue in its opening brief. As a result, Anderson will brief it as well. He does so, however, without waiving or in any way diminishing his objections to consideration of the issue.

2. The Open And Obvious Doctrine Does Not Apply Here

In *Lugo v. Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001), this Court explained that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty."[3] The Court further held that, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id* at 517.

The *Lugo* Court identified two situations in which an open and obvious condition is unreasonably dangerous. The first is when "an open and obvious condition is effectively unavoidable." *Id* at 518. Such a condition would include, for example, "a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water." *Id.*

Second, "an open and obvious condition might be unreasonably dangerous because of special aspects that pose an unreasonably high risk of severe harm." *Id.* Such a condition would include, for example, "an unguarded thirty foot deep pit in the middle of a parking lot." *Id.* Although a person encountering this condition "would likely be capable of avoiding the

[3] It was undisputed below that, as a person paying a fee to ski at Pine Knob, Anderson was an invitee on its premises.

danger[,]" the condition "would pose such a substantial risk of risk or severe injury" that the open and obvious doctrine would not apply. *Id.*

The danger posed by the timing shack's placement shares both of the special aspects cited above. First, the danger was unavoidable for Bobby Anderson. The record demonstrates – again without contradiction – that Pine Knob designated the area in which the race was to take place the day of the accident; that Pine Knob placed the shack where it was located when Bobby struck it; and that Bobby had no choice but to complete his second run within feet of the timing shack. Shick Deposition at 11-12, 32, 42-43 (App 9b-11b, 15b, 25b-26b). Like the standing water in the example cited in *Lugo,* therefore, the danger posed by the shack's placement was "effectively unavoidable" for Bobby Anderson. *Id.*[4]

The shack's placement also posed an unreasonable risk of severe harm, like the unguarded pit in the second *Lugo* example. The shack was placed a mere eight to 10 feet from the finish line of the course that Anderson was required to ski. Costigan Deposition at 38-40; Parrot Deposition at 8 (App 39b-32b; 3b). The finish line is the portion of the course on which the skiers reach their maximum speed, since that portion is straighter and skiers typically finish in a "tuck" position. Costigan Deposition at 54 (App. 36b). Thus, Anderson and the other young skiers would reach their maximum speed just as they encountered the hazard posed by the shack.

Any impact with the shack at those speeds was likely to have severe consequences. Pine Knob's General Manager indeed testified that he "consciously, deliberately consider[ed]" the

[4] It is no answer to say that Anderson could have avoided this danger by refusing to participate in the race that day. *Lugo* requires a danger to be "effectively unavoidable," not theoretically so. 464 Mich at 518. And just as the danger posed by standing water in the *Lugo* example was effectively unavoidable despite the theoretical possibility that the customer could remain in the store until the water evaporated, so too was the danger posed by the shack's placement effectively unavoidable despite the theoretical possibility that Anderson could have sat out the race.

risk of a skier striking the shack when he ordered the shack to be padded (albeit inadequately). Shick Deposition at 28 (App. 12b). Moreover, even a brief review of the cases litigated under the Act reveals that skiing injuries are often extremely serious, often involving quadriplegia or death. *See, e.g., Barr v Mt Brighton, Inc,* 215 Mich App 512, 456 NW2d 273 (1996). Thus, like the unguarded pit in *Lugo,* the shack's placement posed a risk of severe harm.

That risk, moreover, was unreasonable. As demonstrated *supra* at 8-9, the record shows the danger posed by the shack's placement was totally unnecessary. The shack could have been moved anywhere, including to the top of the hill, where it is now. Shick Deposition at 30 (App. 13b); Costigan Deposition at 17 (App. 28b). In fact there was no need to have a shack at all. Rosengren Deposition at 17 (App. 47b). In this respect, the danger posed by the shack was more unreasonable than that posed by the unguarded pit in *Lugo,* since the shack could have been carried off by a forklift, whereas the pit could not. It was, therefore, "unreasonably dangerous to maintain the condition" presented by the shack's placement. 464 Mich at 518.

The danger posed by the shack thus combined the worst of both worlds: The danger was effectively unavoidable, and posed an unreasonable (and indeed unnecessary) risk of severe harm. The existence of both these "special aspects" is amply supported in the record, particularly when viewed (as it must be) in the light most favorable to Anderson. And either of these special aspects, standing alone, is sufficient to except the danger posed by the shack from the open and obvious doctrine. *Id.* That doctrine, therefore, does not bar Anderson's claims.[5]

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[5] It bears mention that the open and obvious inquiry typically concerns whether a premises owner's duty to an invitee "encompass[es] *removal* of open and obvious dangers.[.]" *Lugo, supra,* at 516 (emphasis added). In this case, however, Pine Knob did not merely fail to *remove* an unreasonable risk of harm. Rather, it affirmatively *created* an unreasonable and unnecessary risk of severe harm by its placement of the timing shack. Thus, in addition to arguing under *Lugo* that Pine Knob had a duty to *remove* the shack, Anderson argues that Pine Knob had an

D. The Ski Area Safety Act Does Not Displace Common-Law Principles Of Premises Liability *In Toto*

1. This Issue Has Not Been Preserved For Review By This Court

This Court's October 30, 2002 Order granting leave to appeal directs the parties to brief "the role, if any, of principles of common law premises liability in claims arising under the Ski Area Safety Act, MCL 408.321 *et seq.*" Anderson will of course comply with this directive.

Anderson respectfully submits, however, that this issue has not been preserved for review by this Court. The issue referenced above was not raised by any party at any point in the proceedings below. The issue likewise was not considered, decided, or in any way addressed by either the Circuit Court or the Court of Appeals. Nor has the issue been considered by any other Michigan court in construing the statute, perhaps because no litigant or court has ever suggested that the Act displaces the common law of premises liability *in toto*. This case thus falls in the heartland of "the well-established rule that issues not presented to the trial court or the Court of Appeals are not preserved for review by this Court." *Bitar v Wakim,* 456 Mich 428, 435 n 2; 572 NW2d 191 (1998).

This rule is likewise a well-established one for the U.S. Supreme Court, which presumably faces many of the same concerns as does this Court in determining which issues to review. As Justice Scalia has stated, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Penn Dept of Corrections v Yeskey,* 524 US 206, 212-13 (1998); *see also, e.g., Glover v US,* 531 US 198, 205 (2001) ("in the ordinary course we do not decide issues neither raised nor resolved below"); *NCAA v Smith,* 525

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antecedent duty not to *create* a gratuitous risk of severe harm, "open and obvious" or not. And Pine Knob breached both duties.

US 459, 470 (1999) ("As in [other cases], we do not decide in the first instance issues not decided below").

There are good reasons for this rule. The most prominent is that, when an issue is not addressed below, this Court is "deprive[d] . . . of the valuable assistance of the Court of Appeals" in considering the issue. *Tidewater Oil Co v United States,* 409 US 151, 169 (1972). This is particularly true where, as here, no Court of Appeals has *ever* considered the issue. Second, when an issue is neither raised nor decided in the trial or appellate court, the factual context for the issue is not likely to be developed as it should be. Relatedly, as Justice Thomas has observed, there is the issue of fairness to litigants:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decisions there of issues upon which they have had no opportunity to introduce evidence.

Sims v Apfel, 530 US 103, 109 (2000) (quoting *Hormel v Helvering,* 312 US 552, 556 (1941)).

The circumstances of this case would hardly appear to compel any departure from the settled practice of this Court. The issue whether the Act displaces common law is neither urgent nor, frankly, of overwhelming public importance. Thus, if the rule cited above were not followed in this case, it is difficult to see why it would be followed in any case. Anderson respectfully submits, therefore, that "the well-established rule that issues not presented to the trial court or the Court of Appeals are not preserved for review by this Court[,]" should govern here. *Bitar, supra,* at 435.

2. The Ski Area Safety Act Cannot Be Construed To Displace Common-Law Principles Of Premises Liability *In Toto*

MCL 408.326a enumerates certain duties owed by ski area operators, irrespective of whether they would arise under common law. Section 408.342(1), in turn, enumerates certain duties owed by skiers, again irrespective of whether they would arise under common law. And § 342(2) enumerates certain risks that skiers are deemed to assume, irrespective of whether they would be deemed to assume them under common law.

The Act thus displaces the common law to some extent. But that extent was carefully defined by the Legislature. And, for a multitude of reasons, the Act simply cannot be construed to displace the common law *in toto.*

a. Statutes In Derogation Of The Common Law Must Be Narrowly Construed

As Justice Taylor has observed, "[t]his Court has repeatedly spoken regarding the construction of statutes in derogation of the common law[.]" *Koenig v City of South Haven,* 460 Mich 667, 677 n 3; 597 NW2d 99 (1999). To wit, "statutes in derogation of the common law must be strictly construed, and *will not be extended by implication to abrogate established rules of common law.*" *Id* (emphasis added; brackets and internal quotation marks omitted). Thus, "[w]here there is doubt regarding the meaning of such a statute, it is to be given the effect which makes the least rather than the most change in the common law." *Id; see also, e.g., Nation v WDE Electric Co,* 454 Mich 489, 494; 563 NW2d 233 (1997) ("statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law"); *Marquis v Hartford Accident & Indemnity,* 444 Mich 638, 653; 513 NW2d 799 (1994) (same); *Energetics, Ltd v Whitmill,* 442 Mich 38, 51; 497 NW2d 497 (1993) ("Where there is doubt regarding the meaning of such a statute, it is to be 'given the

effect which makes the least rather than the most change in the common law'") (quoting 3 Sutherland, *Statutory Construction* (5th ed), § 61.01); *City of Flint v Patel,* 198 Mich App 153, 161; 497 NW2d 542 (Taylor, J.) (statutes in derogation of the common law "must be strictly construed").

This rule precludes any holding that the Act displaces the common law of premises liability *in toto.* Specifically, it precludes any holding that the enumeration of ski-area operator duties in MCL 408.326a is exclusive of any additional duty of care owed by ski-area operators under the common law. Section 326a simply provides that "[e]ach ski area operator shall, with respect to the operation of a ski area, do all of the following[.]" The section then enumerates seven highly specific duties, *e.g.,* "[e]quip each snow-grooming vehicle and any other authorized vehicle, except a snowmobile, with a flashing yellow rotating light conspicuously located on the vehicle[.]" MCL 408.326a(a). The Act nowhere states that its enumeration of ski-area operator duties is exclusive, or otherwise provides that it abolishes *in toto* the common law of premises liability as applied to ski-area operators.

Thus, if the Act were regarded somehow as abolishing that common law, it could only do so by implication. But that is precisely the construction forbidden by the rule stated above: "The statute must not be construed to abrogate established common-law principles by implication." *Bak v Citizens Ins Co,* 199 Mich App 730, 738; 503 NW2d 94 (1993) (Corrigan, J.). Under a straightforward application of this settled rule, therefore, the Act cannot be construed to abolish the common law of premises liability as applied to ski area operators.

Two further points bear emphasis. First, consistent with the rule recited in *Koenig,* in cases where the Legislature *did* intend to abolish the common law in some respect, it has used express language to do so. *See* MCL 700.2911 ("The common law right of disclaimer or

renunciation is abolished"); MCL 600.2902 ("All writs of right, writs of dower, writs of entry, and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in this act . . . are abolished"); MCL 500.3135 (subject to certain exceptions, "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was is in effect is abolished"); MCL 600.2965 ("The common law doctrine that precludes a firefighter or police officer from recovering damages for injuries arising from the normal, inherent, and foreseeable risks of his or her profession is abolished"); MCL 259.209a(3) ("the common law garage keeper's lien as to an aircraft is abolished"). In contrast, the Ski Area Safety Act contains no such text expressly abolishing *in toto* the common law of premises liability as applied to ski-area operators.

Second, and relatedly, the rule recited in *Koenig* is one on which the Legislature is entitled to rely. This Court has stated – in the context of applying this very rule – that it "will presume that the Legislature of this state is familiar with the principles of statutory construction." *Nation, supra,* at 494-95 (internal quotation marks omitted). The Legislature, in turn, is entitled to presume that those principles will actually be applied. Specifically, in crafting legislation, the Legislature is entitled to presume – indeed, given this Court's pronouncements, it has no choice *but* to presume – that its statutes will be construed to abrogate the common law *only* to the extent expressly dictated by the text of the statutes themselves.

This latter presumption must be honored. Otherwise, the Legislature will have been directed to draft its statutes according to one set of rules, whereas the courts will construe them according to another. The result, ultimately, would be to give legal effect to a set of values different from those the Legislature thought it was voting on. *Cf. People v McIntire,* 461 Mich

147, 152; 599 NW2d 102 (1999) ("our judicial role precludes imposing different policy choices than those selected by the Legislature"). Thus, any departure from a straightforward application of the *Koenig* rule would significantly impair the democratic process.

In summary, the *Koenig* rule is a simple one. Its application to this case is likewise simple and straightforward. The Legislature, moreover, appears not only to be familiar with the rule, but to have followed it. The courts must do so as well.[6]

b. Construing The Act To Displace The Common Law In Toto *Would Render Critical Portions Of The Act Surplusage*

In construing a statute, the Court "should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 686 (2001); *see also, e.g., Pohutski v City of Allen Park,* 465 Mich 675, 684; 641 NW2d 219 (2002) ("we should take care to avoid a construction that renders any part of the statute surplusage or nugatory"); *Robertson v DaimlerChrysler Corp,* 465 Mich 732, 748; 641 NW2d 567 (2002) ("it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory").

Here, the heart of the 1981 Amendments to the Act, and the provision litigated most often in the courts, is the skier assumption of risk provision in MCL 408.342(2). As noted above, that section provides:

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[6] The Supreme Court of North Dakota has followed this very rule in construing North Dakota's version of the Act, which contains an operator-duties provision identical to MCL 408.326a. *See Bouchard v Johnson,* 555 NW2d 81, 83 (N.D. 1996). Observing that "there is no language in the statute which states the list of [operator] duties is exclusive," the Court held that North Dakota's counterpart to § 326a "does not provide an exclusive list of duties for operators of skiing facilities." *Id* at 83, 84, 85. Other state Supreme Courts have reached the same conclusion, albeit in construing statutes with somewhat different language. *See, e.g., Mead v MSB, Inc,* 872 P2d 782, 786-87 (Mont. 1994); *Clover v Snowbird Ski Resort,* 808 P2d 1037, 1044-45 (Utah 1991). To Anderson's knowledge, no state or federal court has ever construed the enumeration of ski-area operator duties in any statute to be exclusive.

> Each person who participates in the sport of skiing accepts the dangers that inhere in the sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

This section would be rendered surplusage, or at least practically meaningless, if the enumeration of ski-operator duties in MCL 408.326a were regarded as exclusive. Section 326a essentially requires ski-area operators to do the following: (a) equip snow-grooming vehicles with a "flashing or rotating yellow light"; (b) mark snow-making equipment with a "visible sign or other warning device"; (c) mark the entrance to each ski run with a symbol indicating its difficulty; (d) mark the entrance to any ski run that is closed with a symbol indicating it is closed; (e) maintain one or more trail boards "displaying that area's network of ski runs, slopes, and trails"; (f) place a notice of snow-grooming operations on runs where such operations are being performed; (g) post "in conspicuous places open to the public" the skier and ski-operator duties set forth in the Act; and (h) "[m]aintain the stability and legibility of all required signs, symbols, and posted notices". MCL 408.326a(a)-(h).

The duties set forth in § 326a are discrete and highly specific. By their plain terms, they do *not* include protecting skiers from "variations in terrain; subsurface or surface ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris[,]" or any of the dangers set forth in § 342(2).

Thus, if the duties set forth in § 326a were the only ones owed by ski-area operators, there would have been no need for § 342(2). There would have been no need to specify that skiers assume the risks posed by variations in terrain, snow, or ice, for example, because under § 326a the ski-area operator would have no duty to prevent those dangers in the first place. Nor

would there have been any need to specify that skiers assume the risk of impacts with "rocks, trees, or other forms of natural growth or debris." MCL 408.342(2). Stated simply, if an operator's duties are merely to place a flashing yellow light on snow-grooming vehicles, post trail boards, and the like, there is hardly any need for a provision stating that skiers assume the risk of impacts with trees.

The enumeration of operator duties in § 326a, therefore, cannot be regarded as exclusive. To do so would stultify the centerpiece of the 1981 Amendments to the Act, namely, the skier assumption-of-risk provision contained in § 342(2). That provision makes sense only if the common law of premises liability remains in place to the extent not specifically abrogated by the Act. To hold otherwise would render § 342(2) practically, if not absolutely, surplusage.[7]

c. Pine Knob's Argument Is Without Merit

(i) The Act's Preamble Does Not Support The Construction Of The Act Advocated By Pine Knob

Pine Knob addresses none of the issues discussed above. Instead, Pine Knob appears to rely primarily on the Act's preamble in asserting that the enumeration of operator duties in § 326a is exclusive. Specifically, Pine Knob notes that the Act's preamble recites that its purposes include "to prescribe the duties of skiers and ski area operators[.]"

It is true that the Act's preamble contains this language. It is also true that the word "the" can be understood to mean "all," although this Court on occasion has concluded otherwise. *See Hageman v Gencorp Automotive,* 457 Mich 720; 579 NW2d 347 (1998); *Dedes v Asch,* 446

[7] It is, of course, possible that one might conjure some remote hypothetical under which § 342(2) would have at least technical import even if the enumeration of operator duties in § 326a were regarded as exclusive. The surplusage rule reiterated in *Wickens,* however, does not stand or fall based on such hypotheticals. Rather, the rule applies wherever a particular construction of statutory text would render other portions of the text nugatory *as a practical matter.* Otherwise, the rule itself would lack practical significance.

Mich 99; 521 NW2d 488 (1994). For several reasons, however, Pine Knob's argument is meritless.

First, the rule on which Pine Knob relies – which is the same "surplusage" rule reiterated by the Court in *Wickens, supra* – is simply inapposite to the preamble of a statute. It is long settled that a "preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act[.]" *Yazoo Railroad Co v Thomas,* 132 US 174, 188 (1889); *see also, e.g., Jurgensen v Fairfax County,* 745 F2d 868, 885 (4th Cir 1984) (a preamble "is not an operative part of the statute and does not confer powers") (internal quotation marks omitted). Thus, a preamble by its nature is without legal effect. In discussing a preamble, therefore, it makes no sense to cite this Court's rule that "effect must be given to every clause and sentence." *Robinson v City of Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000). The predicate for that rule – namely, enforceable statutory text – simply is not present in the case of a preamble.

Nor can the Act's preamble dictate the manner in which the actual text of the Act is construed. As Justice Corrigan has observed, "a preamble is not to be considered authority for construing an act." *CS & P, Inc v City of Midland,* ___ Mich ___, ___; 609 NW2d 174, 176 (Mich 2000) (concurring opinion); *see also Malcolm v City of East Detroit,* 437 Mich 132, 143; 468 NW2d 479 (1991) (same).

In summary, one word of the Act's preamble cannot be construed so as to render surplusage any of the actual text of the Act, much less a provision as significant as § 342(2). Nor can the Act's preamble negate this Court's long-settled and often-reiterated rules of statutory construction. Plaintiff's argument is without merit.

(ii) The Act's Legislative History Is Irrelevant

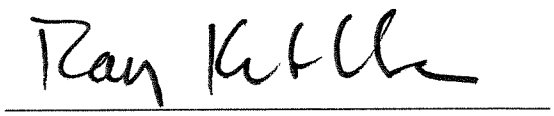
Pine Knob purports to rely on the Act's legislative history in its brief before this Court. However, Pine Knob identifies no ambiguity in actual text of the Act, and there actually being none, resort to legislative history would be improper. *See Sun Valley Foods v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999) ("Only where a statutory text is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent"). Moreover, as Justice Taylor has noted, "[l]egislative histories are *always* suspicious." *Marposs Corp v City of Troy,* 204 Mich App 156, 168 n 2; 514 NW2d 202 (1994) (dissenting opinion) (emphasis in original); *see also Wisconsin Public Intervenor v Mortier,* 501 US 597, 621 (1991) ("we are a Government of laws, not of committee reports") (Scalia, J., concurring). Legislative history thus can provide no succor for Pine Knob here.

IV. CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Feeney Kellett Wienner & Bush

By: 

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